OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 96-21 March 14, 1996

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Impact Analysis and Sections 10(l) and (m)

An anonymous complaint, asserting that Impact Analysis was inconsistent with the casehandling priorities set forth in Sections 10(l) and (m) of the Act, was recently filed with the Office of the Inspector General. By memorandum dated February 12, 1996, the General Counsel submitted a response to the Acting Inspector General. Thereafter, the Acting Inspector General, by memorandum dated February 27, 1996 advised the General Counsel that the priorities established by Impact Analysis are not inconsistent with those provisions of the Act. To assist you in responding to any similar inquiries that you may receive, I am enclosing both memoranda.

B.A.B.

Attachments

John E. Higgins, Jr. February 12, 1996
Acting Inspector General

Fred Feinstein
General Counsel

Impact Analysis

This is in response to your memorandum dated January 19, 1996, wherein you inquired whether there is a possible inconsistency between Impact Analysis and Sections 10(l) and 10(m) of the Act.

During the meetings of the Impact Analysis Work Group, there was a conscious effort to ensure that the Impact Analysis model was in accordance with these sections of the Act and I fully concur with the Work Group that there is no inconsistency. The legislative history of the Labor Management Reporting and Disclosure Act of 1959 suggests that Congress was concerned with Section 8(a)(3)/8(b)(2) cases where the individuals have been deprived of a job and a paycheck. Under Impact Analysis, a significant number of such cases, based upon the scope of the impact on the public, are specifically included in Category III. Such placement affords these cases the greatest resources of the Regions and the earliest time frame for completion of the investigation and implementation of the decision as well as, for meritorious cases, priority on the trial calendar. For example, the reference to Section 10(j) in Appendix A of the Impact Analysis Summary Report (see attached) is intended to conform to the existing identification of cases which may be appropriate for Section 10(j) relief. These cases frequently involve Section 8(a)(3) discharges, particularly during the course of an organizing effort. This Appendix specifically identifies other Section 8(a)(3) cases which should immediately be placed in Category III, including cases involving the resolution of whether a strike or lockout is based on economic or unfair labor practice considerations (typically raised in the context of reinstatement rights) and any case involving the issue of whether a strike is unprotected and the status of the strikers is at issue. Cases involving the discharge of a significant number of employees are also immediately placed in Category III. Systematic abuses of hiring halls and Beck 8(b)(2) type violations involving the national application of a provision affecting the employment of employees would also be placed in Category III.

The Appendix also specifically addresses the placement of Section 8(a)(3) discharge cases which are alleged to occur as retaliation after, or are proximate to, the conclusion of organizing efforts, and which are not otherwise candidates for Section 10(j) consideration. In this regard, these cases are reassessed for Category III placement as soon as they appear meritorious. In addition, under Impact Analysis, Category II discharge cases are to be afforded, whenever possible, a higher priority in litigation than other Category II cases. See attached Impact Analysis Report, Nov. 1995, p. A-13. It should also be noted that all Section 8(a)(3)/8(b)(2) cases, other than those which can be deferred under Collyer/Dubo, are accorded greater priority than all Category I cases, which constitute an estimated 25 to 30 percent of the Regions' cases.

Section 10(m) must be read as being congruent with our statutory mission, and not as an isolated operational requirement which must be adhered to regardless of its detrimental consequences upon the public and our mission. Thus, Section 10(m) could be interpreted "as a direction to the Board that it ensure the most expeditious processing of Sections 8(a)(3) and 8(b)(2) claims consistent with its expertise and other statutory responsibilities." Hammontree v. NLRB, 925 F.2d 1486, 1495 (D.C. Cir. 1991). Impact Analysis represents an attempt to be true to the Congressional intent which motivated Section 10(m), a desire to maximize our effectiveness. At present, numerous cases covered by Section 10(m) are handled no more promptly, and frequently less timely, than other cases both during the investigative and litigation stages. Thus, non-Section 8(a)(3)/8(b)(2) cases are sometimes handled more expeditiously under the current system due to various factors, such as high visibility of the labor dispute. Thus, Impact Analysis takes greater cognizance of Section 10(m) than is afforded under the current casehandling system.

With respect to Section 10(l), Impact Analysis places such cases in Category III. See Appendix A. Moreover, these cases will continue to be processed under the longstanding 72 hour time target. See Impact Analysis Report, p. A-9.

Impact Analysis attempts to honor the core purpose of the statute while developing an operational strategy which conforms to the Government Performance and Results Act (GPRA). This statute mandates

that agencies identify and be held accountable for the outcomes or impact of their efforts upon the public, in an era of diminishing resources, where the Agency's greatest challenge is to maintain and improve its effectiveness and relevance. Consistent with GPRA, Impact Analysis differentiates cases so as to ensure that cases with the highest impact on the public are handled most expeditiously and to assure that streamlined investigative techniques can be applied to appropriate cases.

I trust the foregoing is responsive to your inquiry. If you need any additional information, please advise.

F.F.

Attachments

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

To : File Date: February 27, 1996

From : John E. Higgins, Jr.
Acting Inspector General

Subject : Impact Analysis --
(OIG-I-147)

This case was initiated after an individual, who requested anonymity, complained to the OIG that the proposed Impact Analysis Program (IAP) of the Office of the General Counsel was not consistent with the casehandling priorities set out in Sections 10(l) and (m) of the Act. Initial investigative contact was made by memorandum to the Office of the General Counsel on January 19, 1996. On February 12, 1996, the General Counsel responded by memorandum.

In his response, the General Counsel argues that the IAP does not violate the statutory priorities. He notes that many 8(a)(3) and 8(b)(2) type cases are included in the highest priority category (III), that those 8(a)(3) cases in Category II are given higher priority than other cases in that category and that to the extent that the IAP focuses on certain types of 8(a)(3)/8(b)(2) cases it gives "greater cognizance of Section 10(m) than is afforded under the current casehandling system." The General Counsel also notes that Section 10(l) priority cases will continue to be processed under a 72 hour investigative time target.

The General Counsel also makes two additional points; one based on the legislative history of the LMRDA and the second, based on the newly mandated reporting requirements of the Government Performance and Results Act (GPRA).

I agree with the General Counsel that the system developed by his office is not inconsistent with either the spirit or the historical application by this Agency of the statutory priorities of Sections 10(l) and (m). Indeed, as the General Counsel correctly notes, the IAP proposal actually "takes greater cognizance" of those priorities than has been done in the past. But more importantly, a reading of the limited legislative history of Section 10(m) does not suggest that it is to be mechanistically applied or that it is intended to override the managerial and prosecutorial casehandling discretion granted to the General Counsel in Section 3(d) of the Act. The few references in the Legislative History show a Congressional concern about employer loss of job and livelihood prompted the priority provision. This concern is reflected and accommodated in the IAP Report. The mandate

of Section 10(m) if applied literally would give statutory priority to a one day suspension case over a bargaining order case. Clearly that could not have been Senator Mundt's intention when he introduced Section 10(m) as an amendment. In sum, I conclude that the General Counsel has Section 3(d) authority to set casehandling priorities but that he must do so within the guidelines of Sections 10(l) and (m). I am satisfied that the priorities set out in the IAP are not inconsistent with that authority or with those guidelines.

J. E. H.

cc: General Counsel
Chairman Gould
The Board
Ms. Carlson
Mr. Benson